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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

70-243

No. ~~1787~~

TIT TIT WONG and NEI NGAN CHAN,

*Petitioners,*

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID CARLINER
Pennsylvania Building
Washington, D.C. 20004
*Attorney for Petitioners*

Washington, D.C. THIEL PRESS 202 393-0625

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which sustained final orders of deportation of the Board of Immigration Appeals.

## OPINION BELOW

The opinion of the Court of Appeals was rendered on March 19, 1971 and is unreported. The opinion is set forth in Appendix A.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1971 (App. 17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, for the purpose of the 4th Amendment, a person has been "seized" when a law enforcement official snatches the keys from the ignition of the car in which he is sitting, has the car guarded with an armed policeman who would "probably updraw his weapon to get [him] to stay in the car", and shortly thereafter blocks the guarded car with a government automobile?

2. Whether the observation by an Immigration and Naturalization Service officer of two persons of Chinese extraction leaving a hospital waiting room while the officer is questioning another Chinese person furnished the officer with a "reasonable basis to detain them for interrogation" to ascertain whether they have violated U.S. immigration laws?

3. Whether evidence obtained as the result of such "detention for interrogation" may be used to sustain their deportation?

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides in part:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly, describing the place to be searched and the persons or things to be seized."

Section 287 of the Immigration and Nationality Act, 8 U.S.C. 1357, provides in part:

> Sec. 287. (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

## STATEMENT

On November 7, 1967, Immigration and Naturalization Service* Officers Joseph E. Taylor and Joseph E. Reissig went to the Washington Hospital Center in response to a request from a receptionist who "had some doubt as to (the) nationality of a Chinese" who applied for medical service "on a charity basis".[1] (R. 41-42, 45, 62-64)

*Hereafter referred to as INS.

[1]The Record does not disclose whether the receptionist's purpose was to establish whether the applicant for medical assistance was eligible for treatment or to assist the INS in locating aliens illegally in the United States. See *Matter of Lane*, Interim Decision No. 2064, Board of Immigration Appeals, in which it appears that the Travellers Aid Society secretly identifies to INS authorities persons believed to be aliens illegally in the United States. The Applicant, a brother of one of the Petitioners, was found after fifteen minutes of questioning to have "no immigration problem." (App. 19a)

At the hospital, Reissig remained in an automobile belonging to INS. Taylor went to the out-patient waiting room "to interview a Chinese". When he went into the room, Taylor walked directly to the receptionist and "three Chinese (who) were facing towards the people in the reception room". In addition, "there were two Orientals or possibly Chinese" near the back of the waiting room. Taylor noticed that "they got up and left after (he) approached the receptionist and showed (his) identification to her; talking to the Chinese patient". (R. 46, 47, 64-66, 69).

Taylor testified that "it appeared to me there was something odd about them leaving when I entered". He decided not to "go chase these two men", but instead to complete the interview with the Chinese patient on whose account he had come to the hospital. That transaction took approximately fifteen minutes. Taylor then left the waiting room to inform Reissig that he was "interested in two Chinese who had been in the waiting room and who were no longer there" and asked him to "be on the lookout for them". Taylor then went back into the hospital and went through various corridors looking for them. (R. 47, 65-68)

Approximately thirty minutes from the time that Taylor first saw the petitioners leave the waiting room, he saw them again. (R. 72) In Taylor's words:

> "They were walking toward the parking lot away from where I was and they were looking back, and as they looked back they saw me, or it may not have been me that they saw, but it appeared to me that they were looking at me; and they quickened their pace. . .a very quick pace. . .moving rapidly, a little faster than a regular walk." (R. 71-72)

By the time Taylor caught up with them, the petitioners were in an automobile. As described by Taylor:

> "One got in the back seat and the other sat in the seat opposite the driver, and from somewhere he had a set of keys. He slid over to the driver's seat and was trying to put the keys into the ignition, but he

> apparently didn't know how to do it. The other was trying to lock the doors apparently to prevent me from talking to them.". (R. 49)

Taylor spoke to them but "had no response in English . . . They talked Chinese and . . couldn't communicate". He "asked them for papers and got nowhere with them . . ." He then reached into the car and took the car keys from the dash. At that moment, Taylor noticed a hospital security guard in a policeman's uniform and "asked him to come over to watch the car and instructed him not to let the Chinese leave the car". (R. 49, 77, 78) The policeman was armed. (R. 102)

The police officer testified that if petitioners had tried to leave,

> ". . . I probably would try to stop them. I would probably upraw my weapon but not to fire. If they were going to leave I wouldn't have shot them, but I would probably pull my weapon to get them to stay in the car". (R. 103)

Taylor then went to get his partner. Together in the "Government car" they "drove back to the area where the Chinese were and parked the Government car in front of the automobile occupied by the Chinese". (R. 51, 87)

At that time, by coincidence, Taylor observed another "young Chinese man walking down the sidewalk". That person, a student conversant in Cantonese but otherwise unidentified and not questioned by the INS officers,[2] was asked to talk to petitioners in Chinese and was able to ascertain from the two Chinese in the automobile that "they had jumped ship". (R. 51, 74, 90, 92)

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[2]Taylor identified himself (R. 51) but made no effort to ascertain the identity of the "young Chinese man" (R. 80). The existence of the "Passing Chinese Students" was put in doubt by a witness during the proceedings, but nonetheless acepted by the hearing officer, the Board of Immigration Appeals and the Lower Court, although never produced by INS. (App. 7a, Fn. 4)

At this point the two INS Officers "took the two Chinese into custody, put them in the Government car", and drove them to the office of the Immigration and Naturalization Service where they were questioned through an official interpreter. (R. 53)

As a result of such questioning, the INS Officers ascertained the petitioners' identity and ultimately obtained the documents used to sustain the deportation charges against the petitioners. (R. 54, 60)

Petitioners moved during the deportation proceedings to suppress the documentary evidence used to sustain their deportation, contending that they were "arrested" when the keys were taken out of the automobile which they were occupying and an armed, uniformed hospital guard assigned to prevent them from leaving the car. The Special Inquiry Officer denied petitioners' motion. (R. 56)

On appeal, the Board of Immigration Appeals, affirmed the power of INS to interrogate the petitioners, pursuant to Section 287(a) of the Immigration and Nationality Act, 8 U.S.C. 1357(a), holding, with regard to the imposition of custody in the automobile, that "it is well settled that a law enforcement official may, in the performance of his duty, temporarily detain and question an individual without placing him under arrest". (App. 25a)

The Board also held that "in order for an arrest to exist, it must appear that the arresting officer made known to the arrested person that he is under arrest". (App. 25a)

A motion to reopen the proceedings to take petitioners' testimony to show that they did in fact believe that they were under arrest was denied. The Board held:

> "It is clear that the testimony of the (petitioners) would be for the purpose of showing that they considered they were under arrest at the time they were approached by Mr. Taylor, at which time Taylor did not have probable cause to arrest them. However, such testimony would not change the result."

Quoting *Yam Sang Kwai v. INS*, 133 U.S. App. D.C., 369; 411 F.2d 683 (1969) *cert. denied*, 396 U.S. 877 (1970), the Board observed that an arrest must be personal, not general, that it must contain an element of awareness on the part of the protagonist and the antagonist and it must restrain the liberty of the individual to the extent that he is not free to leave; there must be knowledge of the situation by both the arresting officer and the suspect. (App. 30a)

The Board held that even if the petitioners "thought they were under arrest, (the INS Officer) had not in fact put them under arrest or intended to put them under arrest. His intention was to interrogate them and to find out if there was probable cause to effect their arrest". (App. 30a)

Based upon its view that the arrest took place only after the admission claimed to have been made to the passing Chinese student, the Board sustained the SIO's decision. (App. 31a)

The Court of Appeals similarly sustained the deportation orders. Relying upon *Terry v. Ohio*, 392 U.S. 1, (1968), the lower court stated that the question is one of the "reasonableness of official action" under the particular circumstances. (App. 15a)

The INS Officers "had reasonable basis to believe that (petitioners) were aliens and to seek to question them", the court below held, because of the "fact that the two Chinese persons immediately got up from their seats in the waiting room and departed" when the INS Officer began speaking with a Chinese patient in the waiting room. (App. 14a)

The District of Columbia Circuit conceded that a determination of the time of petitioners' arrest "is not without difficulty" (App. 15a), but resolved the question by labeling the conduct of the INS officers "an investigatory stop for a reasonable period of time". The time, said longer than "in the usual *Terry* criminal context," was justified because "the delay here was occasioned by the efforts made to find a channel of communication to the petitioners" rather "than in time consumed by their questioning once that com-

munication became possible". The "detention for interrogation" was therefore held to be "brief in duration" at least within the meaning of that term as used in Mr. Justice Harlan's and in Mr. Justice White's concurrences in *Terry*. See Footnote 13, App. 15a.

## REASONS FOR GRANTING THE WRIT

This case, like the companion case of *Yi Lau Au and Lam Sai Ting v. United States Immigration and Naturalization Service*, No. 1770, October Term, 1970, presents important questions relating to the on-the-street confrontations by Immigration authorities with persons believed to be aliens. The Immigration and Naturalization Service contends that its statutory authority, pursuant to Section 287(a)(1) 8 U.S.C. 1357(a)(1), "to interrogate any alien or any person believed to be an alien as to his right to be or remain in the United States" vests it with the power to "temporarily detain and question an individual without placing him under arrest" (App. 9a).

The District of Columbia Circuit has not only sustained what it terms an "investigatory stop for a reasonable period of time" but holds that the briefness of the stop may be elongated the more difficult it is to establish a "channel of communication" to the suspects. (App. 15a-16a)

Two issues of importance are raised by the decision below.

One is the nature of the power of the INS officers to make "an investigative seizure upon less than probable cause for purposes of interrogation".

This, as we have noted in the companion case of *Yi Lau Au and Lam Sai Ting v. United States Immigration and Naturalization Service* No. 1770, October Term, 1970 is an issue which was reserved in *Terry v. Ohio*, 392 U.S. 1, Fn. 16, (1968). Here, there was no "flight" as that term is usually used, nor was there a "hot pursuit" by INS Officers. All that

can be fairly said is that the curiosity of INS Officers was aroused by a "sudden departure" of two persons, Chinese in appearance. It seems clear that the decision of the District of Columbia Circuit that this conduct established a "reasonable basis to believe they were aliens" makes racial distinctions between who "look Chinese" and those who seem otherwise.

The decision below, while relying upon *Terry*, clearly goes beyond its express holding. Inasmuch, as in the circumstances here, which are replicated daily in the routine searches by INS investigators for aliens believe to be illegally in the United States, the holding of the District of Columbia Circuit permits racial classifications to be made by INS officers, it especially warrants examination by this Court. *Hirabayshi v. United States*, 320 U.S. 81 (1942)

Petitioners incorporate here by reference, without restatement, the additional reasons set forth in the companion case, *Au Li Yau and Lam Sai Ting v. Immigration and Naturalization Service*, Petition No. 1770, October Term, 1970.

The bounds of the power of the Immigration and Naturalization Service to "interrogate any . . . person believed to be an alien as to his right to be . . . in the United States", under 8 U.S.C. 1357(a)(1), have not heretofore been reviewed by this Court. With the ruling of the court below, linking that power with authority, assumed under *Terry*, to "detain" such persons "briefly", the nature of that power and its relationship to the Fourth Amendment are of critical importance to aliens and to persons who are "believed to be". They are, of course, important also to the Immigration and Naturalization Service which exercises the power.

The second issue is the nature of an arrest.

The decision of the District of Columbia Circuit, while urged upon it by the Government below,[3] is contrary to the argument made by the Government in this Court in *United States v. Campos-Serrano*, No. 1028, October Term, 1970. In the latter case, where the Government seeks to avoid the obligation to give *Miranda* warnings, it urges that whether a person is in custody must be determined by a "standard under which the objective circumstances, rather than subjective feelings of the police or the suspect . . . are examined . . ." (See Brief for United States, pp. 31-32).

It states that the "proper standard" is set forth in *Lowe v. United States*, 407 F.2d 1391, 1396-1397 (C.A. 9) (1969) which holds that:

> "Whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard, although the officer may have an intent to make an arrest, either formed prior to, or during the questioning. This is not a factor in determining whether there is present 'in custody' questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a 'reasonable man' test, which are determinative". *(ibid.)*

The District of Columbia Circuit, which previously had held that "a seizure" must be personal, not general; that it must contain the element of awareness on the part of the protagonist and the antagonist; and it must restrain the liberty of the individual to the extent that he is not free to leave"; See *Yam Sang Kwai v. INS*, 133 U.S. App. D.C. 369, 411 F.2d 683 (1969), *cert. denied*, 396 U.S. 877 (1970); has

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[3] See Brief for Respondent, *Tit Tit Wong and Nei Ngan Chan v. U.S. Immigration and Naturalization Service*, No. 23,527, U. S. Court of Appeals for the District of Columbia Circuit, pp. 7-13.

relied upon subjective factors in holding that there was no arrest here.[4] And it has relied upon relabeling what seems plainly to be a "seizure", as that term is used in the Fourth Amendment, to a pheonomenon described as an "investigatory stop for a reasonable period of time" to avoid the reach of this Court's holdings with regard to investigative arrests. See *Columbo v. Connecticut*, 367 U.S. 568, 573-575 (1961).

The issue here is before this Court, for the purpose of determining whether *Miranda* warnings are required, in *United States v. Campos-Serrano*, 401 U.S. 936, Petition No. 1028, October Term, 1970.

In view of the fact that the questions raised here are closely related to those in No. 1028, petitioners urge that the decision below be reviewed by this Court in order to permit a broader examination of the arresting procedures of the Immigration and Naturalization Service in its day-to-day confrontations with persons believed to be aliens.

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[4]See Fn. 12 (App. 15a), in which the District of Columbia Circuit relies upon testimony that petitioners were not aware of the presence of the uniformed armed hospital guard, that the guard was not sure what he would have done if the petitioners tried to leave, although he probably would have tried to stop them, but that the issue did not arise because petitioners made no effort to leave. The District of Columbia Circuit overlooked the finding of the Board of Immigration Appeals which assumed that the petitioners "considered that they were under arrest at the time they were approached by Mr. Taylor" but held that "even if the 'petitioners' thought they were under arrest, Taylor had not in fact put them under arrest or intended to put them under arrest. His intention was to interrogate them . . .". By any "reasonable man" test it seems clear, (App. 30a) when car keys are snatched by a government official, an armed guard is placed in watch to make certain that the suspects do not leave the automobile, and when the government automobile is placed in a position to block the automobile of the suspect—that these circumstances objectively show "a physical force or show of authority" which "restrains the liberty" of the person so surrounded.

The standards for determining the nature of an arrest are in disarray among the various circuits. The Solicitor General has called this Court's attention to the fact that the Fifth Circuit "has often made its conclusion . . . rest upon a determination whether officers have subjectively focused their investigation on the person questioned", citing *Windsor v. United States*, 389 F.2d 530 (C.A. 5, 1968); *Agius v. United States*, 413 F.2d 915, 918-919 (C.A. 5, 1969), *cert. denied*, 397 U.S. 992 (1969); *United States v. Montos*, 421 F.2d 215, 223 (C.A. 5, 1970), *cert. denied*, 397 U.S. 532.[5]

See also *United States v. Hall*, 421 F.2d 540, 543-545 (C.A. 2, 1969), *cert. denied*, 397 U.S. 398 (1970), in which Judge Friendly sugtested that *Miranda* "could scarcely have intended the issue (of custody) to be decided by swearing contests" between police officers and their suspects. Compare also *Henry v. United States*, 361 U.S. 98 (1959).

## CONCLUSION

For the reasons urged above, petitioners urged that a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

DAVID CARLINER
*Attorney for Petitioners*

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[5] See Brief for the Government, *United States v. Campos-Serrano*, No. 1028, October Term, 1970, pp. 31-32.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 23,339

AU YI LAU, YIM TSZ KI, LAM SAI TING,
PETITIONERS

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

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No. 23,527

TIT TIT WONG and NEI NGAN CHAN, PETITIONERS

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

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Petition to Review Deportation Order of
Board of Immigration Appeals

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Decided March 19, 197

Judgment entered
this date

*Mr. David Carliner* for petitioners.

*Mr. Charles Gordon,* General Counsel, Immigration and Naturalization Service, of the bar of the Supreme Court of the United States, *pro hac vice,* by special leave of the court, with whom *Messrs. Thomas A. Flannery,* United States Attorney, and *John A. Terry,* Assistant United States Attorney, were on the brief, for respondent. *Mr. Paul C. Summitt,* Attorney, Department of Justice, also entered an appearance for respondent.

Before: FAHY, *Senior Circuit Judge,* McGOWAN and LEVENTHAL, *Circuit Judges.*

McGOWAN, *Circuit Judge:* These two statutory review proceedings, although not consolidated in this court, were argued together and are suitable for disposition by one opinion. They involve deportation orders issued, after evidentiary hearings, by a Special Inquiry Officer of the Immigration and Naturalization Service (INS), which were affirmed by the Board of Immigration Appeals. Our review is circumscribed by the Congressional commands that it be limited to the administrative record, and that findings of fact therein be taken as conclusive "if supported by reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. § 1105(a). There is no issue in either case as to the adequacy of the evidence upon which the orders rest. The claim in each is, rather, that the evidence was the fruit of an illegal arrest. We look first to the factual circumstances from which each of these contentions derive.

## I

*No. 23,339*

Petitioners in this case are three Chinese seamen who are charged with deserting their ships in American ports. On October 31, 1967, immigration officers at the Washing-

ton, D.C., field office received an informant's tip that aliens unlawfully in this country were working in a restaurant located in the downtown area which had been under periodic surveillance by the Washington immigration office for the preceding year. In response to this tip, some seven of the officers walked to the restaurant, which was a few blocks from their office. They had no warrants because they lacked information of the requisite degree of specificity.

Upon their arrival, some of the officers stationed themselves at the main exits of the restaurant. Three of the officers entered the restaurant by way of the front entrance, and spoke to the assistant manager who was in charge at the time. They identified themselves, told him the purpose of their visit, and asked his permission to enter the restaurant in order to talk to the employees. The assistant manager agreed to their coming into the resturant, but there was some disagreement as to whether he permitted them to conduct their investigations in the kitchen. The Board of Immigration Appeals accepted the finding of fact by the Special Inquiry Officer that the officers had received such an invitation.

As the officers proceeded towards the kitchen, they observed a person of Chinese extraction, dressed in a blue denim uniform, scurrying through the dining room to the main entrance door. One officer (Burns) followed him to the door, stopped him, identified himself as an immigration officer, and asked the individual, later identified as petitioner Yim, to accompany him to the kitchen. As the two headed back toward the kitchen, a second employee, petitioner Lam, also dressed in kitchen garb, was met by them as he appeared to be hurrying towards the front door. He was requested by Officer Burns to go to the kitchen for a talk. Lam did so momentarily, but suddenly darted through a side door, only to encounter Officer Lamoreaux who asked him if he was off a ship and received an affirmative answer. Petitioner Lam then was sent to the locker room to change

his clothes before being taken to the immigration office. When Officer Burns and petitioner Yim arrived in the locker room of the kitchen, Burns asked Yim if he had jumped a ship, to which Yim replied that he had.

During this time, two officers were questioning the employees in the kitchen, when two of the workers dropped their culinary utensils and darted out the rear door. One of the officers gave chase and halted one of the fleeing kitchen workers, later identified as petitioner Au. With the aid of another employee, who acted as interpreter, Au was questioned immediately by the officer who detained him, and admitted that he had "jumped" ship. The officer then took him to the locker room where they joined the other petitioners. All three petitioners were searched, and the officers seized seamens' documents from each petitioner which indicated that in fact they had overstayed their leave.

The three petitioners then accompanied the officers to the immigration office, where they awaited the arrival of an interpreter.[1] In the presence of the interpreter, sworn statements were taken from each of the three in which they admitted that they had come to this country as crewmen, and were illegally in the United States.[2]

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[1] The record reveals that petitioners were able to speak in broken English and therefore they were able to answer the simple questions of the detaining officers. However, it is clear that for the purposes of an affidavit an interpreter was needed.

[2] Before the interrogation began at the immigration office, each petitioner was, in accordance with INS policy, given the full *Miranda* warnings. Each stated that he did not wish counsel to be provided. There is no issue raised in this case as to the adequacy either of the warnings or the waiver. *Compare* United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970), *cert. granted* March 1, 1971, (*Miranda* warnings held necessary where, after one interrogation and exami-

*No. 23,527*

On November 7, 1967, petitioners Wong and Chan, persons of Chinese extraction, accompanied Mr. Wong's ailing brother to the Washington Hospital Center where the latter made application for medical treatment.[3] The receptionist at the hospital doubted the sick man's right to be in this country, and called the Washington immigration office. Officers Taylor and Reissig were dispatched to the hospital where, upon arrival, Officer Taylor went inside to question the sick man, and Officer Reissig remained in their government car by the front entrance.

Once inside the hospital, Officer Taylor went to a waiting room where he was to interrogate the applicant for medical assistance. However, when he identified himself to the receptionist as the immigration officer for whom the patient and the two other Chinese (see note 3 *supra*) men had been waiting, and started talking to the Chinese patient at the desk, he noticed that the two petitioners rose from their chairs and left the room. Officer Taylor testified that he thought there was something odd about their departure; accordingly, when he had concluded the task of interrogating the prospective patient—a questioning that lasted some fifteen minutes, resulting in the clearance of

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nation of an alien's identification papers, the immigration officers, having thereafter acquired some reason to believe that the alien was guilty of the crime of altering the papers, returned a second time to examine the papers without first giving the warnings). Similarly, since here the restaurant owner consented to the entry by INS agents we are not required to consider the disposition appropriate in a case of unconsented entry and a claim of illegality due to lack of search warrant.

[3] There were apparently two other men of Chinese extraction in the party, one of whom is identified in the record as Mr. Yee Kong Ling.

petitioner Wong's brother—he thought he "would make quiet inquiries" and see if he could find the two men who had left.

Officer Taylor advised his colleague he was interested in these two Chinese and intended to look for them in the hospital "so that he could talk to them." He then spent approximately fifteen minutes more searching several corridors and other waiting rooms in the hope of finding the two petitioners. He stepped out of a side door of the hospital onto a sidewalk, and spotted petitioners by the hospital parking lot, about half a block away. He saw them looking back, and when they saw him they quickened their pace on into the parking lot, and broke into a jog or "sort of dog trot," glancing back at Officer Taylor as they went.

For a while they got out of his field of vision, but then he saw them inside a car parked in the lot. As Taylor approached the car, one of the men, who was in the back seat, attempted to roll up the car windows and lock the car doors. The other was in the front seat, and tried to start the car. Due to what was described by Officer Taylor as a basic unfamiliarity with the vehicle, neither petitioner was successful at his task. Taylor then attempted to question them through an open window, but soon realized that there was an insurmountable language barrier. He decided to enlist the support of Officer Reissig. In order to insure that petitioners would not leave, Officer Taylor took their car keys and asked a nearby hospital guard to watch the car for a moment. Officer Taylor located Officer Reissig, and the two returned about five to seven minutes later, bringing their car to a halt in front of the one in which the two petitioners were seated.

Several more minutes elapsed while the two officers again tried unsuccessfully to communicate with the petitioners. At this point, they sought the aid of a passing Chinese stu-

dent, who agreed to act as an interpreter. The Chinese student began his interrogation under the supervision of Officer Reissig. In the meantime, Officer Taylor decided that it might be beneficial to return to the hospital to determine whether the other Chinese men in the building were related to petitioners. After a ten minute search, he found Mr. Ling, who was the owner of the car.

Mr. Ling agreed to accompany Taylor to the parking lot in order to identify the petitioners. Upon returning to the lot, Mr. Ling identified the petitioners as his friends, but refused to aid in their interrogation. However, at that time, Officer Reissig informed Officer Taylor that the Chinese student had discovered that the petitioners were in the country illegally. According to the findings of the Special Inquiry Officer, the student then left the scene of the interrogation.[4] The two officers then arrested petitioners, and transported them to the Washington headquarters. There, petitioners turned over to the investiga-

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[4] Petitioners requested that their hearing be reopened in order that they be allowed to show that the Chinese student never existed. This request was granted by the Special Inquiry Officer. Since petitioners had been instructed by their counsel to remain silent at the hearing, the only method which they could employ to prove the nonexistence of the student was to submit an affidavit by their friend, Mr. Ling. Mr. Ling attested to the fact that he did not see the student when he came to the car to identify petitioners. He further stated that petitioners also denied the existence of the student when they related the incident to him. Mr. Ling was called to the stand in order to be cross-examined by the Government.

Petitioners' counsel also hoped to disprove the existence of the student by pointing out at the hearing that the Government was unable to produce the student as a witness or even to produce the name and address of the student. However, the Board of Immigration Appeals affirmed the finding of the Special Inquiry Officer that there was, in fact, such a student. They based this finding on the testimony of Officers Taylor and Reissig, as well as the hospital policeman. Fur-

tors certain seamens' papers, and also made statements in response to interrogation. These statements were not, however, regarded by the Special Inquiry Officer as competent evidence because of what he found to be the failure of the interrogators to comply with INS regulations requiring advice of right to counsel.

II

At the hearings before the Special Inquiry Officer in both No. 23,339 and No. 23,527, petitioners were represented by counsel but, upon his advice, stood mute and presented no evidence. The claim made on their behalf there, as here, was that petitioners had been arrested without probable cause, and that the evidence offered by the Government against them was the forbidden fruit of these assertedly illegal arrests. In assessing these claims, any restraints upon the freedom of movement of petitioners must be viewed by reference to the statutory authority given immigration officers. There are two provisions of possible relevance, one being addressed to interrogation and the other to arrest, in each instance without warrant.[5]

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thermore, the Board of Immigration Appeals pointed out that the record gives some indication that the student may have left the scene before the arrival of Mr. Ling, thus making Ling's observations not necessarily inconsistent with that of the officers. We are, in this state of the record, without authority to reject this finding of fact.

[5] Both are contained in Section 287 of the Immigration and Nationality Act, 8 U.S.C. § 1357, as follows:

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view

We agree with the Government that the *arrest* provision must be read in light of constitutional standards, so that "reason to believe" must be considered the equivalent of probable cause. Moreover, the Government does not insist that in the matter before us each immigration officer did have probable cause to arrest when he first confronted each petitioner. It is urged that probable cause is needed only if a detention reaches the level of an arrest, and that the original encounters with petitioners were not arrests.

The Government focuses upon the *interrogation* provision of the Act as manifesting a Congressional purpose to permit immigration officers to make detentions for questioning which fall short of a full-blown arrest. It argues that such a reading of the statute is buttressed by two practical considerations: First, the number of individuals seeking to enter this country illegally is quite high, and the number who succeed in this venture has rapidly increased with each passing year; and, second, the ability to gather proof against these illegal entrants independent of a reasonable opportunity for interrogation is exceedingly difficult.

In *Yam Sang Kwai* v. *INS*, 133 U.S.App.D.C. 369, 411 F.2d 683 (1969), *cert. denied*, 396 U.S. 877 (1970), we viewed this provision (Section 287(a)(1)) as according,

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is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

* * * * *

at the least, to immigration officers the right to seek to interrogate individuals reasonably believed to be of alien origin. The underlying rationale of that decision was that the minimal invasion of the privacy of the individual approached for questioning was justified by the special needs of immigration officials to make such interrogations. This allowance for mere questioning, which assumes the individual's cooperation, is analogous to decisions which have contemplated the same scope of authority for police officers,[6] as well as for other administrative officials.[7]

We are in this instance, however, confronted with a question which the court did not have in *Yam Sang Kwai*, namely, whether the immigration officer may detain an individual, reasonably believed to be an alien, against his will for the purpose of questioning.[8] We believe the statutory interrogation authority comprehends such detentions, but, because they are far greater intrusions upon personal privacy than the nonforcible approaches, and since aliens in this country are sheltered by the Fourth Amendment in common with citizens, such a reading of the Congressional mandate must be controlled by the constitutional standards governing similar detentions made by other law enforcement officials. *See Terry* v. *Ohio*, 392 U.S. 1 (1968).

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[6] Green v. United States, 104 U.S.App.D.C. 23, 259 F.2d 180 (1958), *cert. denied*, 359 U.S. 917 (1959).

[7] United States v. Grandi, 424 F.2d 399 (2nd Cir. 1970) (customs officials).

[8] In *Yam Sang Kwai*, the claim was that there had been an arrest without probable cause by reason of the fact that, unknown to the petitioner, immigration officers had been posted outside the building while another officer went inside to question petitioner. We held that no arrest had as yet occurred. Petitioner in that case, when approached for interrogation, cooperated voluntarily. The arrest was made only after the information elicited by questioning provided probable cause to believe that he was in the country illegally.

We hold that immigration officers, in accordance with the Congressional grant of authority found in Section 287 (a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country. Utilizing the standards developed in *Terry*, such detentions are to be judged from case to case by reference to the particular facts of each. We proceed to this inquiry in the two cases immediately before us.

III

With respect to No. 23,339, we disallow the claim that the deportation orders derive from tainted evidence. Our recent decision in *Yam Sang Kwai, supra* p. 9, insulates from illegality the steps taken by the immigration officers in proceeding upon the informant's tip to the restaurant in question and in making the initial dispositions of their forces that they did. Their approach was orderly. They were at some pains not to disrupt the regular routine of the restaurant. The management official in charge was asked for authority to enter the restaurant and to conduct the questioning in the kitchen area.[9] Such disorderliness as occurred was the product solely of the efforts of petitioners to flee the premises.

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[9] The assistant manager's testimony was that he offered the officers a table in the restaurant at which they could question employees, but he admitted that he did not forbid them from going into the kitchen. The officers testified that his grant of permission on the latter score was explicit. The special inquiry officer found this last to be the fact, and his finding was accepted by the Board. We think the finding has adequate support in the record, and we are concluded by it. 8 U.S.C. § 1105(a)(4). *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

It was this response to the appearance of the immigration officers which, we think, sufficed to create a reasonable suspicion in the minds of the officers that petitioners might be illegal aliens, and thereby, under the *Terry* doctrine, warranted the temporary detention of petitioners for interrogation.[10] In the case of petitioner Yim, indeed, it is not even clear that there was a detention against his will since, once accosted in his apparent progress towards the front door, he appears to have acquiesced readily in the request by Officer Burns to accompany him to the kitchen. Once there, he immediately said that he had jumped a ship. Petitioners Lam and Au manifested their purpose to flee in a more positive manner, and would have gotten away if they had not been affirmatively intercepted. They, thus, ended up in the kitchen under circumstances more nearly resembling forcible detention, although each had given the information that he was off a ship when initially intercepted and before he reached the kitchen.

In the case of all three, there had come into being, by the time they were foregathered in the kitchen, probable cause to arrest without warrant under Section 287(a)(2); and they were so arrested and taken to the Immigration

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[10] In United States v. Curtis, —— U.S.App.D.C. ——, 427 F.2d 630 (1970), we remarked *en banc* the relevance of flight at the appearance of the police to the reasonableness of a warrantless entry upon private premises for the purpose of arrest. We quoted the statement of the Supreme Court in Peters v. New York, 392 U.S. 40, 66-7 (1968), that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." If flight can contribute so greatly to probable cause for arrest, it certainly has the capacity in appropriate circumstances to generate the lesser degree of reasonable suspicion requisite for an investigatory stop.

Office. No claim is made here that anything improper occurred in their further interrogation there. The argument is, rather, that their arrests occurred simultaneously with the initial approach to them by the officers in the restaurant, and before the officers acquired knowledge constituting probable cause. We think that, at most, those confrontations involved temporary detentions for questioning which were authorized by Congress and which did not, on these facts, fall afoul of the Fourth Amendment.

## IV

In No. 23,527, as noted hereinabove, the Government's case had to be made without the aid of the statements taken from petitioners Wong and Chan in the course of the investigation conducted at the Washington office following their arrest at the hospital parking lot. The Government now argues that, even if the arrests be deemed illegal, affirmance is in order because the documentary evidence introduced was sufficient to show illegal presence in the country by reason of petitioners having overstayed their limited shore leaves; and that these documents were of an official character and came into the Government's possession independently of the taking of petitioners into custody. The record, however, is in an abominably muddled state on this score, and we are unable to conclude from our examination of it that the Government's claim in this regard is well taken.[11] We look, then, to the merits of the claim of taint arising from illegal arrest.

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[11] What the Government itself terms a major item of evidence against petitioners, namely, the crewman's landing permit (which shows the date, place, and manner of admission into the country), appears to have been located as a direct result of the detention. In the case of petitioner Wong, the Government learned, after questioning him at the immigration office, that his permit was in the hands of Mr. Ling.

Therefore, the immigration officers called Mr. Ling and asked him to bring the document to the office, which he did. Petitioner Chan's permit was either seized from his person after he was arrested or was brought to the office by Mr. Ling after Chan was questioned.

The Government points out that the remainder of the This inquiry, of course, is the same as that we have pursued in No. 23,339. There is here no preliminary issue of the *Yam Sang Kwai* nature, since the errand upon which the two officers came to the hospital was undisputedly legitimate, *i.e.*, to check the status of the ailing Mr. Wong at the request of the hospital receiving authorities. When Officer Taylor arrived at the hospital, identified himself to the receptionist as an immigration officer, and began talking with the Chinese patient who was awaiting his arrival, his attention was struck by the fact that the two Chinese persons immediately got up from their seats in the waiting room and departed. He proceeded with his check of the sick man, but resolved to explore the suspicious circumstance further as soon as he had dispatched the business immediately at hand. That took only about 15 minutes, and then he started to look for the two who had left the waiting room. He had reasonable basis to believe they were aliens and to seek to question them.

We have recounted above Officer Taylor's search through the hospital corridors, his sight of petitioners when he came out the side door of the hospital, their hasty repairment to the auto on the parking lot when they saw him, and their unsuccessful efforts to lock the car against him and to drive away. When they appeared unable to respond

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documentary evidence (Hong Kong discharge books and Hong Kong and Australian seaman's identity cards) consisted of identification papers located in the files at the immigration office. The record does not make this fact clear. However, even if this were true, we think it not unlikely that their availability may have been dependent upon determining what date and in what place petitioners entered the country.

to his questions because of a language barrier, he reached in and took the car keys for the purpose of keeping petitioners on hand until he could find help in communication.

Petitioners press upon us that it was at this point that an arrest without probable cause occurred.[12] The point is not without difficulty, especially since several minutes elapsed before the matter of communication was brought to resolution by the fortuitous appearance of the Chinese student, who was able to talk to petitioners and who reported that they had exceeded their permissible shore leaves. The *Terry* doctrine in terms contemplates that detention for interrogation, as distinct from arrest, will normally be brief in duration,[13] and the reasons why this should be so do not require explication. But the question remains one of the reasonableness of official action under the particular circumstances, and there is no fixed formula as to time, especially when we are dealing with minutes rather than hours. The delay here was occasioned by the efforts made to find a channel of communication to petitioners, not in the time consumed by their questioning once that communication became possible.

We think that the conduct of petitioners prior to and

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[12] They stress also the circumstance that Officer Taylor asked a hospital guard, who happened to be in the vicinity, to keep an eye on the car while he went to find his partner. The testimony of record indicates that the making of this request was not known to petitioners and that they were not aware of the presence of the guard during the five minutes or so that Taylor was away. The guard testified that he was not sure what he would have done if petitioners had tried to leave the car, since Taylor had said nothing about this contingency, although he thought he would probably have endeavored to stop them. The issue, in any event, never arose, since petitioners continued to sit in the car.

[13] The word "briefly" appears in both Justice Harlan's and Justice White's concurrences in *Terry*. 392 U.S. at 33, 34.

upon entering the car, including their vainly seeking to start it, was such as to found a reasonable suspicion about their status within the meaning of the gloss we have hereinabove put on Section 287(a)(1). That being so, Officer Taylor was justified in subjecting petitioners to an investigatory stop for a reasonable period of time. Because of the language barrier, that stop proved longer here than would be necessary in the usual *Terry* criminal context. But different areas of law enforcement have different problems, and legal doctrine common to all must be of sufficient flexibility to accommodate these differences. We are not persuaded that this record presents a picture of official oppression unrelieved by the quality of reasonableness central to the concept of the Fourth Amendment.

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We find the deportation orders in both Nos. 23,339 and 23,527 to be valid, and we deny the relief sought in the respective petitions for review.

*It is so ordered.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1970

No. 23,527

[Filed: Mar. 19, 1971]

TIT TIT WONG and NEI NGAN CHAN,
*Petitioners*

v.

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE,
*Respondent*

Petition for Review of an Order of the Immigration & Naturalization Service.

Before: Fahy, Senior Circuit Judge, and McGowan and Leventhal, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Immigration and Naturalization Service, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the Immigration and Naturalization Service on review herein is hereby affirmed.

Per Curiam

For the Court:

/s/ Nathan J. Paulson
Clerk

Dated: March 19, 1971.

Opinion by Circuit Judge McGowan.

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

February 6, 1969

Files: A-15759508 – Washington, D.C.
A-15759509

In re: WONG TIT TIT
CHANG NEI NGAN

IN DEPORTATION PROCEEDINGS

APPEAL

ORAL ARGUMENT: August 13, 1968

On behalf of respondents: David Carliner, Esquire
Warner Building
Washington, D.C. 20004

On behalf of I&N Service: R. A. Vielhaber
Appellate Trial Attorney

CHARGES:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) – crewman – remained longer (each respondent)

Lodged: None

APPLICATION: Termination of proceedings

Respondents appeal from the special inquiry officer's order finding them deportable as charged. The appeals will be dismissed.[1]

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[1] Separate hearings started on November 13, 1967, were consolidated by agreement and joint hearings were held thereafter. No one record contains the complete testimony. References to pages preceded by "R" will be found in either record. Page references not attributed to the Chan record are from the Wong record. Exhibit references are to exhibits in record under discussion.

On advice of counsel, respondents remained mute at the deportation hearing. The special inquiry officer found that the Service evidence established that each respondent is an alien illegally in the United States since he remained without authority after he was admitted as an alien crewman from foreign for a period not to exceed 29 days. The special inquiry officer found one respondent to be Wong Tit Tit, who had been admitted about April 9, 1967, and the other to be Chan Nei Ngan who had been admitted about July 24, 1966. Counsel contends that respondents were arrested illegally and that deportability is not properly established because the evidence used was obtained as a result of the illegal arrest.

The testimony of Service investigator Taylor (corroborated by Service investigator Reissig in essential details as to those matters in which both took part) is to this effect: he and Reissig went to a hospital clinic to investigate the immigration status of a Chinese person who had applied for medical treatment as a charity case. Reissig remained in the Service car in front of the hospital. Taylor went to the clinic where the applicant for medical assistance, Wong Wook Wong, brother of respondent, Wong, and two companions (one, Yee Kang Ling, the other unidentified) were standing before the clinic interviewer. As he identified himself, preparatory to questioning Wong Wook Wong, his suspicion was aroused by the sudden departure of two Chinese men who had been sitting in the rear of the room (pp. 7, 11, 27-28, R 8-10). However, he continued the questioning of Wong Wook Wong until satisfied that no immigration problem was involved. This took about 15 minutes (p. R 29). Then he looked for the two men who had so suddenly departed. Unable to find them after glancing through the rooms and corridors on the ground floor, he notified his partner to watch the front exit and went, by way of the rear door, to the parking lot at the side of the building (pp. R 30-31). About 10 to 15 minutes had elapsed since he started searching. In the parking lot, he saw two men. They looked back. Upon seeing him

they quickened their pace and disappeared from view (pp. 8, R 31-35). He followed and discovered them in a car. One man attempted to lock the door of the car, apparently to prevent him from talking to them, the other attempted to start the car but apparently, because of his unfamiliarity with the operation, was unable to do so (pp. 8, R 10-11, 33). He attempted to question them, but could not communicate with them: he could speak no Chinese and they no English (pp. 9, R 12). He decided to get Reissig's help, and to talk to the three Chinese men in the clinic who he thought might have some connection with the two men (p. 9). He took the car keys (pp. 10, R 11, 13). Identifying himself to a uniformed hospital security guard who was walking nearby, he asked him to watch the two men (who remained in the car) and to prevent them from leaving, if it became necessary (p. 9, R 39-41). The respondents could not have heard him (pp. R 12-13). The security officer was about 8 to 10 feet away from the car on an elevated sidewalk (pp. R-11-12). He found Reissig and drove with him to the parking lot. There they blocked the car in which the two men were still sitting. Reissig also was unsuccessful in communicating with them (pp. R 13, 40). He (Taylor) noticing a young Chinese man (one he had not seen before) walking on the sidewalk, asked him to try to act as interpreter. The young man agreed (pp. 9-12, R 13, 36-37). Leaving the questioning to Reissig, he (Taylor) returned to the hospital to seek the three Chinese men (pp. R 13, 37-38). Yee Kang Ling, when shown the keys, said the car was his. Taylor gave him the keys and asked the three to come to where the others were (pp. 10, R-14). When they arrived (Reissig said it was about ten minutes after Taylor had left (pp. R 48, 54)) he learned that Reissig, with the help of the volunteer, had discovered the identity of the two men and the fact that they were illegally in the United States (pp. 10-12, 23-24, R 14-15). The investigators then determined to arrest the respondents. They escorted them to the Service office (pp. 11-12, R 15) where they questioned them and took affidavits.

The security officer testified (pp. R 61-73) that while Taylor had not specifically asked him to prevent the men from leaving, if they had made the attempt, he would have tried to stop them (p. R 66). He had them under observation for 5 to 7 minutes (p. R 66). He believed that they were unaware that he was watching them (R 66). He verified the use of the volunteer interpreter (pp. R 63-64, 67-68, 72-73).

The special inquiry officer found that alienage was established in each case by a seaman's discharge book (Ex. 4) and seaman's identity book (Ex. 5). In Chan's case he also considered a seaman identification card (Ex. 6). These documents came from the Service files (p. R 22). The special inquiry officer found the illegality of the respondents' stay established by their crewman's landing permit (Form I-95A) (Exs. 3) showing the date, place and manner of admission. Whether Chan had his permit with him when apprehended or whether as was Wong's it was delivered to the Service by Yee at the Service request, after the Service had questioned the respondents in the Service office, is not clear (pp. 16-19, R 15-23).[2]

Counsel contends that the respondents' arrests were made without probable cause and therefore without authority. This contention was based on the belief that the arrests occurred when Taylor had the security officer stand watch over respondents to prevent them from leaving the automobile. Counsel points out that this occurred before there had been any conversation with respondents that would have enabled Taylor to believe he had cause to make an arrest. He also contends that the evidence fails to establish that there was any meaningful conversation with respondents before they were taken to the Service office. He contends the record fails to establish that a volunteer acted as interpreter: he points out the Service did not produce

[2]Form 1-95A is inadvertently referred to as Form I-94 at the reopened hearing of May 1, 1968 and in the special inquiry officer's order of July 8, 1968.

the volunteer, that Yee's affidavit, which is in the record, makes no reference to the presence of the volunteer, that the respondents told Yee that there had been no conversation between them and the Service officers, and that there had been no volunteer who had spoken to them while they were in the automobile. Counsel contends that the evidence used at the deportation hearing was obtained as a result of the illegal arrest and therefore could not be used to deport respondents.

The special inquiry officer ruled that the arrests occurred when the investigators decided to take respondents to the Service office. He held the arrests were legal and that the evidence later secured, except for the affidavits, could be considered in determining deportability. The special inquiry officer ruled out use of the affidavits because they had been taken without respondents being advised of their right to counsel, although the regulation (8 C.F.R. 287.3) required persons arrested without a warrant to be advised of this right. The special inquiry officer found that the following facts clearly established that the Service investigators had learned before respondents' arrest that they were illegally in the United States: the testimony of the Service investigators as corroborated by the security officer, the weak nature of the respondents' rebuttal through Yee's affidavit, and the possibility that Yee was absent during the time the volunteer had been used. The special inquiry officer did not deal with whether an arrest might have occurred before the Service officers learned through the volunteer that the respondents were illegally in the United States. The point was raised at the hearing (p. 13).

Immigration provisions which authorize the questioning and arrest of aliens and are pertinent to the issue here follow:

> . . . The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privi-

lege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, . . . (sec. 235(a) of the Act, 8 U.S.C. 1225(a)).[3]

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) . . . to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . . .

(3) Within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; . . . (sec. 287(a) of the Act, 8 U.S.C. 1357(a)).

Definitions—(a)(1) *External boundary.* The term "external boundary," as used in section 287(a)(3) of the Act, means the land boundaries and the coast line of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.

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[3]See *Nason v. INS*, 370 F.2d 865, 868 (2 Cir. 1967), (same case, different issue, 394 F.2d 223, cert. denied 21 L. Ed. 2d 101); *Sherman v. Hamilton*, 295 F.2d 516 (1 Cir. 1961) cert. denied 369 U.S. 820. But see *Lee Tin Mew v. Jones*, 268 F.2d 376 (9 Cir. 1959).

> (2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director . . . . (8 C.F.R. 287)

Counsel seeks to place the issue in terms of the power of a Service investigator to indiscriminately detain and arrest a person. We need not pass on this contention for it is not the situation presented here. There are several important differences. Taylor did not indiscriminately approach respondents: their actions gave him reason to believe they should be questioned. Then, Taylor did not seek the aliens to arrest them: he sought to question them. Finally, the elements of an arrest did not exist until Taylor took the aliens into custody. In addition, consideration must be given to the fact that Taylor was acting in an area where immigration officials have broad power. We shall discuss these points in detail.

The record shows that Taylor originally sought to question the respondents because of an on-the-scene occurrence, which to this alert investigator, seemed a suspicious circumstance. Taylor, an investigator with over 18 years of experience, could well have considered the sudden departure of the respondents as connected with the fact that he had just identified himself as an Immigration official and he could reasonably have concluded that they wished to avoid the possibility of an interrogation as to their identity and right to be in the United States. These inferences seemed all the more the probable explanation of their sudden departure when he observed that they looked back as if to learn whether they were being followed, that they quickened their pace when they saw him, and that they sought to lock him out of the car and to drive away. Finding that the respondents spoke no English, and still merely desiring to talk to them, not to arrest them, it was reasonable for him to pursue his investigation by getting the help of his partner, seeking the services of interpreters he believed were nearby, and taking steps to assure the presence of the respondents

for questioning—a questioning he obviously believed would take place within a relatively short time. Taylor acted reasonably in seeking to question respondents (see e.g., *McLester v. United States*, 306 F.2d 880 (10 Cir. 1962), cert. denied, 379 U.S. 1001 (1965).

It is important to note that Taylor sought to question the respondents, not to arrest them. There is an important distinction between the two actions. It is well settled that a law enforcement official may, in the performance of his duty, temporarily detain and question an individual without placing him under arrest. *Rios v. United States*, 364 U.S. 253 (1960); *Shorey v. Warden*, 401 F.2d 474 (4 Cir. 1968); *Allen v. United States*, 390 F.2d 476 (D.C. Cir. 1968); *Arnold v. United States*, 382 F.2d 4 (9 Cir. 1967); *Gilbert v. United States*, 366 F.2d 923 (9 Cir. 1966), cert. denied, 388 U.S. 922 (1967); *Wilson v. Porter*, 361 F.2d (9 Cir. 1966); *United States v. Vita*, 294 F.2d 524, 529-530 (2 Cir. 1961); *United States v. Montez-Hernandez*, 291 F. Supp. 712 (E.D. Calif. 1968); *Matter of Chan*, Interim Decision 1833. In seeking to question the respondents, there is no evidence that the Service officials threatened, harassed, abused them, or that the officials intended to arrest them up to the time they took them into custody. The stationing of the security officer did not constitute an arrest because it was done, not with the intent of arresting the respondents, but merely to make it possible to interrogate them. We conclude, that in seeking to question respondents, the service officers did not arrest them.

In order for an arrest to exist, it must appear that the arresting officer made known to the arrested person that he is under arrest. *Jenkins v. United States*, 161 F.2d 99 (10 Cir. 1947). In this context, the posting of the security officer did not constitute an arrest, because there is no evidence in this record that the respondents were aware that the security officer was standing guard over them, or that he had been instructed to stand guard over them, or that they considered themselves under arrest as a result of this

incident. On this record, it is concluded that the arrest occurred after the Service officers learned that the respondents were illegally in the United States and took them into custody.

The decision to arrest the respondents without a warrant was proper since the Service investigators, being aware that the respondents were illegally in the United States and that they had fled to avoid interrogation, could reasonably conclude that it was likely they would escape before warrants could be obtained. Since the arrest of the respondents was legal, any evidence secured as a result of the arrest was properly considered and deportability was properly found by the special inquiry officer. *Ah Chiu Pang v. INS*, 368 F.2d 637 (3 Cir. 1966), cert. denied, 386 U.S. 1037; *Shing Hang Tsui v. INS*, 389 F.2d 994 (7 Cir. 1968). Furthermore, deportability could be sustained on the evidence from the Service file establishing alienage, coupled with the presumption in section 291 of this Act (8 U.S.C. 1361).

Finally, although this is not a deciding factor, we must point out that Immigration officials have broad power within a reasonable distance from any external boundary of the United States and that Taylor was acting in such an area. See also *United States v. Glazious*, 402 F.2d 8 (2 Cir. 1968). But see *United States v. Montez-Hernandez*, supra, at 715 n. 6.

We believe the special inquiry officer properly disposed of counsel's contention that the record does not establish that the services of a voluntary interpreter were used. The record clearly establishes that there is no merit in this contention.

ORDER: It is ordered that the appeals be and the same are hereby dismissed.

CHAIRMAN

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

August 20, 1969

Files: A15 759 508 - Washington, D.C.
A15 759 509

In re: WONG TIT TIT
CHAN NEI NGAN

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: David Carliner, Esquire
902 Warner Building
Washington, D.C. 20004

ON BEHALF OF I&N SERVICE: Newton T. Jones, Esquire
Trial Attorney

CHARGES:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—crewman—remained longer (each respondent)

Lodged: None

APPLICATION: Reopening of proceedings of testimony of respondents

This is a motion to reopen the proceedings in order that the respondents may give testimony relative to their cases, to be incorporated into the record. Upon advice of counsel, they had remained mute at the original deportation hearing on November 8, 1967.

Respondents are natives and citizens of China who both entered the United States as crewmen authorized to remain for a period of time not to exceed 29 days. Respondent Wong entered at Philadelphia on April 9, 1967, and respondent Chan entered at Baltimore on July 24, 1966. They did not depart. The special inquiry officer found that the Service had established that each respondent is an alien illegally in the United States and they were ordered

deported. This decision was appealed to us and on February 9, 1969 we dismissed the appeal.

At the deportation hearing counsel made a motion to suppress certain evidence consisting of various identification and immigration papers (Exs. 3, 4, 5, 6) voluntarily turned over to the Service by the respondents after they were taken into custody. He contended that these items, which established the identity of the respondents and proved the illegality of their being in the United States, were the fruits of their illegal arrest and were thus inadmissible. The special inquiry officer denied the motion to suppress. Counsel did not allow the respondents to testify at that time in the light of prior judicial holdings that testimony upon unsuccessful motions to suppress evidence is admissible against the mover.[1] However, the Supreme Court in a case decided subsequent to respondents' deportation hearing held that adverse evidence obtained from a party in testimony on a motion to suppress may *not* be used to incriminate him at his trial.[2] Counsel seeks through the motion now before us to have the proceedings reopened so that the respondents can testify on their behalf.

The events which culminated in the apprehension of the respondents are set forth in great detail in our prior decision, and it is not necessary for us to repeat them at this time. However, a brief summary is as follows.

On November 7, 1967, Service Investigators Taylor and Reissig drove to the Washington Hospital Center to investigate the immigration status of one Wong Wook Wong, brother of respondent Wong, who had applied for medical treatment, and who was accompanied by two Chinese companions. Taylor entered the interview room while Reissig

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[1] *Heller v. United States*, 57 F.2d 626 (7 Cir. 1932); *Washington v. United States*, 243 F.2d 43 (D.C. Cir. 1957, cert. denied 354 U.S. 914 (1957); *United States v. Airdo*, 380 F.2d 103 (7 Cir. 1967).

[2] *Simmons v. United States*, 390 U.S. 377 (1968); see also *Bailey v. United States*, 389 F.2d 305 (D.C. Cir. 1967).

remained in the Service car in front of the hospital. As Taylor identified himself, preparatory to questioning Wong Wook Wong, his suspicion was aroused by the sudden departure of two other Chinese men who had been sitting in the back of the room. He continued his questioning of Wong Wook Wong, and then went to look for the men who had so suddenly departed. He saw them in a parking lot next to the building, and upon their seeing Taylor they quickened their pace and entered an automobile. Taylor approached to question them, and as he did so, one attempted to lock the car doors, apparently to prevent him from talking to them, and the other attempted to start the car but was unable to do so. Taylor attempted to question them but they were unable to understand each other. He decided to get Reissig's help and to talk to the three Chinese men in the clinic who he thought might have some connection with the two men in the car, or at least to get them to act as interpreters. He took the car keys. Seeing a uniformed hospital security guard who was walking by, Taylor asked him to keep an eye on the two men who remained in the car, and to prevent them from leaving if it became necessary. The respondents could not have heard this conversation. Taylor found Reissig and they drove to the parking lot and blocked the car in which respondents were still sitting. Reissig was also unsuccessful in communicating with them. Taylor noticed a young Chinese man (not seen before) walking by, and he asked him if he would try to act as an interpreter, to which he agreed. Taylor left the questioning to Reissig while he returned to the hospital to seek Wong Wook Wong and his two companions. He found them and they all walked back to the car. Reissig told Taylor that while he was gone (a period of about 10 minutes), he had learned, with the help of the volunteer, that the two men were aliens and that they admitted they were illegally in the United States. At this point Taylor, with probable cause and without a warrant, placed them under arrest and took them to the Service office, where the

investigators questioned them and obtained signed affidavits from each (Ex. 2).

It is clear that the testimony of the respondents would be for the purpose of showing that they considered they were under arrest at the time they were approached by Mr. Taylor, at which time Taylor did not have probable cause to arrest them. However, such testimony would not change the result. In the recent case of *Yam Sang Kwai v. INS,* No. 21,784 (D.C. Cir. 1969), cert. petition pending, No. 1220, October Term, 1968, a case also involving the arrest of an alien by an immigration officer, the court said that an arrest must be personal, not general, that it must contain the element of awareness on the part of both the protagonist and the antagonist and it must restrain the liberty of the individual to the extent that he is not free to leave; there must be knowledge of the situation by both the arresting officer and the suspect. This reasoning is applicable to the case at hand. In the instant case, even if the respondents thought they were under arrest, Taylor had not in fact put them under arrest or intended to put them under arrest. His intention was to interrogate them and find out if there was probable cause to effect their arrest. Taylor acted "reasonably" in light of his statutory authority[3] and Fourth Amendment dictates to insure their presence for questioning, which he believed would take place within a reasonable time.[4] The stationing of the security officer did not constitute an arrest because it was done not with the intent of arresting the respondents but to make it possible to interrogate them.[5] There is an important distinction between the two actions. It is well settled that a law enforcement official may, in the performance of his duty, temporarily detain and question an

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[3] 8 U.S.C. 1357(a)(1).

[4] See e.g., *McLester v. United States,* 306 F.2d 880 (10 Cir. 1962), cert. denied 379 U.S. 1001 (1965).

[5] *Yam Sang Kwai v. INS,* supra.

individual without placing him under arrest.[6] We conclude that, in seeking to question respondents, the Service officers did not arrest them.

However, after learning that the aliens were illegally in the United States, and it appearing that they might flee before warrants could be obtained, the decision to arrest them without a warrant was proper.[7] Since the arrests were legal, the evidence subsequently turned over to the investigators by the aliens, consisting of Exhibits 3, 4, 5 and 6, was properly considered and deportability was properly found by the special inquiry officer.[8] There was no conflict with the guidelines set forth by the United States Supreme Court in two very recent cases[9] regarding the extent to which an arresting officer can go in gathering evidence incident to an arrest.

For the above reasons, we see no justification for reopening the proceedings for the purpose stated. Accordingly, we will deny the motion.

ORDER: It is ordered that the motion be and the same is hereby denied.

CHAIRMAN

[6] *Rios v. United States*, 364 U.S. 253 (1960); *Shorey v. Warden*, 401 F.2d 474 (4 Cir. 1968); *Allen v. United States*, 390 F.2d 476 (D.C. Cir. 1968); *Arnold v. United States*, 382 F.2d 4 (9 Cir. 1967); *Gilbert v. United States*, 366 F.2d 923 (9 Cir. 1966, cert. denied 388 U.S. 922 (1967); *Wilson v. Porter*, 361 F.2d 412 (9 Cir. 1966); *United States v. Vita*, 294 F.2d 524, 529-530 (2 Cir. 1961); *United States v. Montez-Hernandez*, 291 F. Supp. 712 (E.D. Cal. 1968); *Matter of Chan*, 12 I&N Dec. 603 (BIA 1968).

[7] 8 U.S.C. 1357(a)(2).

[8] *Ah Chiu Pang v. INS*, 368 F.2d 637 (3 Cir. 1966), cert. denied, 386 U.S. 1037 (1967); *Shing Hang Tsui v. INS*, 389 F.2d 994 (7 Cir. 1968).

[9] *Chimel v. California*, No. 770, October Term 1968; *Von Clees v. New Jersey*, No. 837, October Term 1968.